IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1677 OF 2003.

Brihanmumbai Municipal Corporation,
a local body duly constituted under
the provisions of the Mumbai Municipal
Corporation Act, 1888, through the
General Manager, Brihanmumbai Electric
Supply and Transport Undertaking having
his office at BEST Bhavan, BEST Marg,
Mumbai 400 001. .... Petitioner.

Versus.

1. Dashrath Satyawan Gawade,
C/o.BEST Workers' Union,
42,Kennedy Bridge, Mumbai 400 004.

2. The General Secretary,
BEST Workers' Union, 42,
Kennedy Bridge, Mumbai 400 004. .... Respondents.

Shri P.M.Palshikar with Ms.R.N.Vora i/by M/s.Craford
Bayley & Co.for the Petitioner.

None for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 16th June, 2006.

ORAL JUDGMENT.

1. By this petition under Article 226 of the Constitution of India, the Petitioner Mumbai Municipal Corporation has taken exception to the order of reinstatement passed by the learned Judge of the 4th Labour Court, Mumbai, in favour of the Respondent No.1 and confirmed in Appeal by the learned Judge of the

Industrial Court. The office noting shows that Rule Nisi has been duly served to the Respondent No.1. None appears for the Respondent No.1. I have heard the submissions of the learned Counsel appearing for the Petitioner-Corporation.

2. With a view to appreciate the submissions made by the learned Counsel for the Petitioner, it will be necessary to refer to the facts of the case in brief. The 1st Respondent was employed by the Petitioner-Undertaking as a Cleaner with effect from 11th July 1992. The case of the Petitioner is that on and from 8th November 1993, the 1st Respondent remained absent without any intimation or permission. According to the case of the Petitioner, three letters were sent calling upon the 1st Respondent to resume duty. Though the letters were duly received by the 1st Respondent, there was no response. Charge sheet was issued on 29th June 1994 to the 1st Respondent for misconduct under the Certified Standing Order Nos.20(F) and 20(K). It appears that the 1st Respondent did not appear before the Inquiry Officer and did not participate in the inquiry. The inquiry resulted into dismissal of the 1st Respondent from service on 27th July 1994.

3. Being aggrieved by the order of dismissal, the

2nd Respondent-Union preferred appeal before the Appellate Authority on behalf of the 1st Respondent. In the said Appeal, the 2nd Respondent produced a medical certificate dated 27th July 1994 purportedly issued by one Dr.C.V.Waradkar in which it was stated that the 1st Respondent was suffering from para typhoid since 8th November 1993 to 23rd November 1993 and he suffered from mental fatigue. The 1st Appellate Authority dismissed the Appeal preferred by the 2nd Respondent. Further appeal was preferred by the 2nd Respondent before the 2nd Appellate Authority. The said Appeal also came to be dismissed by the 2nd Appellate Authority.

4. The 2nd Respondent-Union preferred an application under sections 78 and 79 of the Bombay Industrial Relations Act, 1946 before the Labour Court. The challenge before the Labour Court was on the ground that the inquiry was unfair and that the punishment was shockingly disproportionate to the misconduct alleged. The Application was contested by the Petitioner by filing written statement. By order dated 7th March 1996 the Labour Court came to the conclusion that the inquiry conducted by the Petitioner was not fair and proper. The Labour Court, therefore, permitted the parties to lead evidence. The said order of the Labour Court was confirmed in a Revision Application filed by the

Petitioner. The Petitioner led evidence by examining one Sanjay Mondkar. However, the 1st Respondent did not step into the witness box. An affidavit was filed by an office bearer of the 2nd Respondent-Union before the Labour Court. By Judgment and order dated 30th January 2001, which is impugned in this petition, the learned Judge of the Labour Court held that the charges levelled against the 1st Respondent were conclusively established. However, in view of the medical certificate which was produced by the 2nd Respondent, the Labour Court came to the conclusion that the punishment imposed was disproportionate. Therefore, an order was made directing reinstatement of the 1st Respondent with backwages. The order of the Labour Court has been confirmed by the learned Member of the Industrial Court in an Appeal. The order of the Appellate Court is impugned in this petition.

5. The learned Counsel for the Petitioner has invited my attention to the findings recorded by both the Courts below. He submitted that apart from the fact that the medical certificate relied upon by the 2nd Respondent was not duly proved by examining the concerned Doctor, even the 1st Respondent has not stepped into the witness box for deposing regarding his alleged mental illness. He submitted that in any event

the said certificate has been completely misread by both the Courts below. He submitted that in the light of the findings recorded by the Labour Court, there could not have been an order of reinstatement. He submitted that the Courts could not have referred to and relied upon the evidence which is on record of the proceedings of the Inquiry Officer after the inquiry was held to be unfair and the parties were permitted to lead evidence. He placed reliance on certain decisions reference to which will be made a later stage.

6. I have carefully considered the submissions. It will be necessary to refer to the medical certificate which is relied upon by the Courts below. While considering the medical certificate it must be borne in mind that the allegation of the Petitioner was that the 1st Respondent remained absent from 8th November 1993 till date of issuing the charge sheet i.e. 29th June 1994. The medical certificate is purportedly issued on 23rd July 1994 by Dr.C.V.Waradkar having address at & post Katta, Taluka Malvan. The certificate discloses that Dr.Waradkar claims to be a Homeopath. The certificate reads thus:

> "I do hereby certify that Shri Dashrath Satyawan Gawade of Nandos was suffering from

paratyphoid since 8/11/93 to 23/12/93 and then due to paratyphoid his brain was upset and suffers from mental fatigue still today. Now in my opinion he is cured and fit to join his duty from 25/7/94."

It must be noted here that the certificate was never produced by the 1st Respondent before the Enquiry Officer of the Petitioner. The certificate was produced for the first time by the 2nd Respondent-Union in the Appeal preferred before the 1st Appellate Authority for challenging the order of dismissal. So far as the certificate is concerned, it will be necessary to refer to the findings recorded by the Appellate Court. In paragraph 8 of the Judgment, a specific finding has been recorded that the Labour Court could not have believed the certificate and in fact the certificate cannot be read in evidence. The said finding is correct as the first Respondent has not stepped into the witness box. The certificate is not proved by examining the Medical Practitioner.

7. Thus the medical certificate on which reliance was placed by the 2nd Respondent will have to be ignored. It is pertinent to note that the 1st Respondent has not at all stepped into the witness box

for explaining his admitted absence from duty from 8th November 1993 onwards. There does not appear to be any dispute regarding the receipt of the letters sent by the Department calling upon him to resume the duty. When the absence from duty from 8th November 1993 was admitted, the reasons, if any, for the said unauthorised absence could have been brought on record only by the 1st Respondent as it was a fact within his special knowledge. Though opportunity was granted by the Labour Court, the 1st Respondent has not chosen to enter the witness box. There is no reason assigned why the 1st Respondent did not enter the witness box. Instead of 1st Respondent, an affidavit of the President of the 2nd Respondent-Union has been filed. In the said affidavit he disclosed that the 1st Respondent handed over the medical certificate dated 23rd July 1994 to him. The affidavit has been filed only for the purpose of placing the certificate on record. In the cross-examination the President of the 2nd Respondent-Union admitted that during the inquiry the 1st Respondent did not submit any application on the basis of his sickness. He also admitted that the 1st Respondent had never submitted any application regarding his sickness to the employer. Thus there is absolutely no explanation forthcoming for the long absence of the 1st Respondent from 8th November 1993 onwards.

8. After having discarded the evidence of the medical certificate, the Appellate Court has recorded a finding that the 1st Respondent did not take cognizance of any of the letters sent to him by the Petitioner and remained absent throughout. However, a conclusion is drawn by the Appellate Court that the first Respondent was not in sound frame of mind from the fact that the 1st Respondent did not approach the 2nd Respondent-Union. This finding is clearly a perverse finding which is not based on any material on record. If the medical certificate was to be discarded as done by the Appellate Court, there was no occasion to record such a finding as except for the medical certificate, there was absolutely no material on record to show that the 1st Respondent was not in a sound frame of mind. As indicated earlier, the 1st Respondent did not step into the witness box and as a matter of fact none of the family members of the 1st Respondent has been examined.

9. It will be necessary to refer to paragraph 13 of the decision of the Appellate Court which reads as under:

13. From the report of the enquiry Inspector, it appears that the neighbours of the delinquent informed that the delinquent was mentally disturbed. From the circumstances, it appears that the delinquent might not have been taking any medical treatment for his mental disturbance. There appears substance in the reasons assigned by the delinquent for his absenteeism. The fact that the earlier service record of the delinquent is unblemished and clean is not disputed."

It is pertinent to note that none of the members of the family of the 1st Respondent were examined. What is referred to in paragraph 13 of the Judgment of the Appellate Court is the report of the Inquiry Inspector made at the time of effecting service of the charge sheet. In view of the decision of the Apex Court in the case of Neeta Kaplish v/s. Presiding officer, Labour Court and another (AIR 1999 S.C. 698), the report of the Inquiry Inspector cannot be said to be a material on record of the Labour Court and it cannot form part of the evidence before the Labour Court. The observation regarding the past record is insignificant as the 1st Respondent was employed from 11th July 1992 and thus he

was in the employment only for a period less than 1-1/2 year with the Petitioner. In paragraph 15 the learned Member of the Industrial Court has stated thus:

> "The charges of absenteeism has been proved, but it is a fit case to take lenient view and instead of inflicting harsh punishment which amount to economical death. To meet out the end of justice, it would be just and proper to deprive the employee of back wages and that would be a sort of punishment for the absenteeism. I find that the Labour Court has rightly held that the punishment is shockingly disproportionate."

It is obvious that the conclusion drawn is based on no material whatsoever which was before either the Labour Court or the Industrial Court.

10. If the findings which are recorded by the Labour Court in paragraphs 8 and the findings which are recorded by the learned Member of the Industrial Court in paragraphs 8 to 12 of its Judgment are considered, it is obvious that the final orders which are passed are completely contrary to the said findings. The Judgments of the Courts below suffer from perversity and are

required to be set aside.

11. The Writ Petition succeeds and hence the following order is passed:

O R D E R

. Rule is made absolute in terms of prayer clause (B) with no order as to costs.

Judge.